Seneca Nation of Indians

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PRESIDENT'S OFFICE

October 31, 2006

National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington DC 20005
Attn: Penny J. Coleman, Acting General Counsel

Re: Comments on Class II Classification Standards
Comments on Electronic or Electromechanical Facsimile Definition
Comments on Technical Standards

Dear Ms. Coleman:

On May 25, 2006, the National Indian Gaming Commission ("NIGC") published two proposed rules in the Federal Register: (1) *Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic, Computer, or Other Technologic Aids"* ("Classification Standards"), and (2) *Definition for Electronic or Electromechanical Facsimile* ("Definitions"). 71 Fed. Reg. 30232 (May 25, 2006); 71 Fed. Reg. 30238 (May 25, 2006). On August 11, 2006, the NIGC published a third proposed rule: (3) *Technical Standards for "Electronic, Computer or Other Technological Aids" Used in the Play of Class II Games* ("Technical Standards"). 71 Fed. Reg. 46336 (Aug. 11, 2006). The proposed rules are intended to clarify terms relative to Class II Gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA").

This letter provides the comments of the Seneca Nation of Indians ("Nation") on all three of the proposed regulations. For the reasons set forth below, the Nation requests that the NIGC abort its current regulatory effort.

I. Background: Class II and Class III Gaming Under IGRA

The IGRA categorizes Indian gaming into three classes. As pertinent here, Class II gaming includes bingo, as well as "pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo" if played in the same location as the bingo activities. 25 U.S.C. § 2703(7). IGRA authorizes tribes to utilize "electronic, computer, or other technologic aids . . . in connection" with Class II gaming activities. Class III gaming is defined as all gaming that is neither Class I or II, including the "electronic and electromechanical facsimiles" that are expressly excluded from the definition of Class II gaming. 25 U.S.C. § 2703(8).

Each class of gaming is subject to different regulatory regimes. Class II gaming is subject to joint regulation by the Indian nation and by the NIGC. Class III gaming on Indian lands is lawful if conducted pursuant to an approved tribal gaming ordinance, is located within a state that permits such gaming, and is authorized by a Tribal-State gaming compact negotiated between the Indian nation and the state in which its Indian lands are located. 25 U.S.C. § 2710(d). These distinctions in the regulatory framework lend significance to the classification of games under IGRA. Games that are Class II remain so, even if "computer, electronic or technologic aids are used in connection" with those games. If, however, the device constitutes an "electronic or electromechanical facsimile" of a game of chance, then it is a Class III gaming, which may not be conducted without a Tribal-State gaming compact.

II. Promulgation of the Proposed Regulations is Unwarranted and Unjustified

As an initial matter, the Seneca Nation is not convinced that the proposed regulations are warranted or justified. As recently as 2002, the NIGC revised the relevant definitional regulations concerning three key terms in the IGRA. 67 Fed. Reg. 41166 (June 17, 2002). As stated in the 2002 preamble, the driving force behind that regulatory effort was the fact that "federal courts, including no less than three United States circuit courts of appeal, have been virtually unanimous in concluding that the Commission's definitions are not useful in distinguishing between technologic aids and facsimiles." 67 Fed. Reg. at 41168. Thus, because of the lack of federal court deference, among other reasons, the NIGC felt duty-bound to amend the regulations to "codif[y] existing Federal court decisions and assure that the Commission will follow such decisions." 67 Fed. Reg. at 41172.

In the preamble to the Classification Standards, the NIGC states that new regulations are necessary to provide greater clarity as between Class II and Class III gaming devices, but offers no support for its position. Although the 2002 regulatory effort was necessitated by federal court disregard for the prior NIGC regulations, here, no less than two federal courts have relied on the 2002 regulations in declaring the lawfulness of certain devices as Class II. And, unlike the situation prompting the 2002 amendments, no federal court has called the existing regulations into question. Even more, while the U.S. Department of Justice ("DOJ") has expressed its views with respect to the NIGC regulatory proposals (and the NIGC conceded that the proposed regulations incorporate or otherwise address DOJ's views), there is no indication that DOJ prompted the promulgation of the regulations in the first instance.

In addition to the foregoing, a review of the NIGC consultation transcripts and comments received by the NIGC thus far reveals **unanimous** tribal opposition to the proposed rules. This vehement opposition was reiterated at the NIGC public hearing held on September 19, 2006. At the hearing, tribal leaders questioned why the NIGC intends to move forward with regulations that will destroy an entire class of gaming, and in so doing, further upset the critical balance struck in IGRA. The Nation echoes these sentiments.

Based on the foregoing and the lack of any congressional directive prompting the current regulatory initiative, the current effort is simply unwarranted and unjustified.

III. The Classification Standards Impose Unlawful and Arbitrary Limitations on Class II Gaming

The determination of what constitutes a Class II versus Class III gaming device should not be made in a vacuum. Congress' purpose in enacting IGRA should be considered when the NIGC interprets it. Chief among those purposes is to promote "tribal economic development [and] self-sufficiency." 25 U.S.C. § 2702(1). That interest would plainly be served by allowing tribes the greatest flexibility to offer games through dispensers or use technology in connection with bingo and pull-tabs that does not alter its character as a game. Indeed, the Senate Report accompanying IGRA notes that:

> the Committee intends [in its definition of class II gaming] that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic

development. The Committee specifically rejects any inference that tribes should restrict class II games to existing game sizes, levels of participation, or current technology.

S. Rep. 100-446, 100th Cong., 2d Sess. (1988) at 9.

In light of these considerations and as set forth below, the proposed regulations place unreasonable and unwarranted restrictions on the use of technologic aids in connection with bingo- and pull-tab-based Class II gaming devices.

A. Bingo

IGRA defines Class II gaming to include "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith)" if: (1) it is played for monetary or other prizes with cards containing numbers or other designations; (2) the card holder covers the numbers or designations, following a drawing or electronic determination; and (3) "the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards." 25 U.S.C. § 2703(7)(A)(i). IGRA simply requires that the game of bingo, lotto, or other games similar to bingo be "played for prizes, including monetary prizes, with cards bearing numbers or other designations." 25 U.S.C. § 2703(7)(A)(i)(I). However, proposed section 546.4 would add details regarding the minimum size for a card being displayed, the permissible amount of the screen that can show something other than the card(s) being played, precise grid size, frequency of which a given designation may appear on a card, a statement that must be "prominently displayed" on any technological aid, how prizes must be communicated and awarded, and how a display should visually depict the "covering" of the number. None of these additional details are mandated, or even implicit, in the IGRA.

The Classification Standards are designed to slow down the speed of play by imposing video display and notification requirements—all of which has the effect of restricting class II games by size, participation and technology. For example, proposed section 546.6 of the Classification Standards describes a lawful "cover". To "cover," a player in a game must take overt action after the numbers or designations are released by touching (daubing) the screen or a designated button on the player station at least one time in each round after a set of numbers or

other designations is released. This part of the Classification Standards requires the game to be won by the "first person" who covers a bingo pattern. 25 U.S.C. § 2703(7)(A)(i)(III). To satisfy this requirement, electronic bingo must be played by multiple players through a linked system. The Classification Standards require this system to have a minimum of two players for each game and must allow at least six players to enter the game. The Classification Standards also require specific minimum time requirements tied to different aspects of the play of the game. The practical effect creates a game that lasts a minimum of ten seconds.

The statutory text negates any additional requirement suggested in the Classification Standards. In fact, courts have found that the explicit criteria in the IGRA constitutes the sole requirements for a game to qualify as bingo. *U.S. v. 162 Megamania Gambling Devises,* 231 F.3d 713 (10th Cir. 2000); s*ee also, United States v. 103 Electronic Gambling Devices,* 223 F.3d 1091 (9th Cir. 2000). Indeed, as the Ninth Circuit observed in *United States v. 103 Electronic Gambling Devices*:

> There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?

223 F.3d at 1096.

In citing to *United States v. 103 Electronic Gambling Devices*, the Tenth Circuit similarly found that the game under review, Megamania, meets the three criteria found in IGRA's definition and rejected the government's arguments that certain variations in the game made it a Class III game. 231 F.3d at 719-20. The courts have underscored that IGRA rests on the proposition that Congress did not intend to "limit bingo to its classic form." 223 F.3d at 1096-97. Put differently, Congress fully anticipated that gaming devices, and thus the play of bingo and games similar to bingo, would evolve with technology.

There is certainly no basis for the NIGC to impose additional classification requirements that go beyond those set forth by Congress.

B. Pull-Tabs

As more fully set forth in the Classification Standards, "the proposed regulation requires the pull-tabs or 'instant bingo' tickets exist in tangible medium readily accessible to the player at the player station," "the game may not accumulate credits for the player," and "[t]he player station may not dispense winnings in any form." 71 Fed. Reg. at 30252 (citations omitted). In the view of the Nation, there does not appear to be any legal support for these particular restrictions in connection with pull-tab devices in the Class II context.

The central underpinnings of the three cases that have dealt with technology in the pull-tab context was the fact that "the game is in the paper rolls" – that is, the arrangement of winners comes from an order established by the paper roll and is not generated (as in the devices at issue in *Cabazon Band of Mission Indians v. NIGC,* 14 F.3d 633 (D.C. Cir. 1994) and *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535 (9th Cir. 1994)) by a computer chip internal to the device. *See United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003), *cert denied*, 540 U.S. 1229 (2004); *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000); *Seneca-Cayuga Tribe of Oklahoma v. NIGC,* 327 F.3d 1019 (10th Cir. 2003), *cert denied*, 540 U.S. 1218 (2004). As the Eight Circuit underscored with respect to Lucky Tab II, "the paper pull-tab card itself is the player's only path to winning. The machines have nothing to do with the outcome of game." *Santee Sioux*, 324 F.3d at 614; *see also Diamond Game*, 230 F.3d at 370 ("[i]nstead of using a computer to select patterns, the Lucky Tab II actually cuts tabs from paper rolls . . . Without the paper rolls, the machine has no gaming function at all. It is, in essence, little more than a high-tech dealer. Viewed this way, the game played with the Lucky Tab II is not a facsimile of paper pull-tabs, it *is* paper pull-tabs.") (Emphasis in original).

Thus, even if a pull-tab dispenser built and cashed credits, the game ultimately remains in the paper. Mechanically, the device still cuts and dispenses paper tabs. Paper pull-tabs from the same deal as played in the machines may be purchased over the counter. Thus, players buying over the counter compete directly with machine gamblers. Pull-tab dispensers that simply give a pull-tab card to the player in exchange for money (or its equivalent), in the same fashion as a live cashier would, do not change the fundamental characteristics of the games. The dispenser which builds credits contains no mechanism for determining the winner of the pull-tab game it assists.

In addition to the foregoing, the building and playing of credits does not change the fact that players compete against one another to obtain winning paper cards from a set of cards that contains a predetermined number of winners. As the Tenth Circuit Court of Appeals held in

Chickasaw Nation v. United States, 208 F.3d 871, 877 (10th Cir. 2000), "when a player purchases a ticket [from a pull-tab deal], he is competing against all other persons who purchase tickets from that same series," because all players are competing for the limited number of winning tickets distributed randomly within the same deal. The *Chickasaw* Court specifically rejected the contention that each individual pull-tab should be viewed as a separate game with only one person playing the game by peeling the ticket. *Id.* The dispensers merely deliver pull-tabs from a roll that is part of a larger deal; those who use the device to play the game of pull-tabs are competing against all other persons who purchase pull-tabs from the same deal. *See Cabazon*, 14 F.3d at 637 (holding that even in a fully computerized version of pull-tabs, the players compete against one another and not against the machine).

The building and playing of credits also does not change the fact that the dispensers broaden the participation level of the game of pull-tabs, something Congress intended to allow. The dispenser provides another way for players to purchase pull-tabs from a pull-tab deal, and thereby enables tribes to sell more pull-tabs than they could sell through clerks alone. In this way, the device increases the number of players simultaneously participating in the game of pull-tabs. Increased sales of pull-tabs also permit tribes to increase the size of each deal, thereby expanding participation in each pull-tab game.

The limitations and arbitrary restrictions contained in the Classification Standards both with respect to bingo and pull-tab games are not mandated by federal case law, and do not account for advancements in technology which were contemplated by IGRA and established by court precedent. Several Indian nations throughout the United States, including the Seneca Nation of Indians, have made substantial financial investments based on an understanding that the federal courts had resolved several open issues in the realm of Class II gaming. The current effort to add these new requirements after-the-fact will serve no purpose other than to create further uncertainty in those areas where the courts have established some certainty, and to attempt to hamstring future technological advances in gaming.

IV. The Process for the Certification of Games Usurps the Primacy of Tribes With Respect to Gaming Classification

For purposes of establishing uniform minimum classification standards for Class II "electronic, computer, or other technologic aids," section 546.9 proposes a rigorous certification

process that must be established and adhered to prior to the authorization of Class II "aids" in a tribal gaming operation. Under the proposal, a qualified and independent testing laboratory must certify that the technologic aid meets the Classification Standards before a tribal gaming enterprise can use the technologic aid. The testing laboratory is to provide a report that it has tested and evaluated the game or "aid" and that the game or "aid" meets the Classification Standards. Finally, the rule provides that the tribal gaming regulatory authority is free to adopt additional classification standards so long as they do not undermine the NIGC's minimum standards.

Under the proposal, the Chairman of the NIGC is required to review the certification and accompanying report and may object to a report. An objection must be made within sixty days of receipt of the certification and report. In absence of a "good cause" objection thereafter, parties may lawfully operate the technologic aid. If the Chairman does object, he/she has thirty days to attempt to resolve the dispute with the aid of a mediator or third party, if necessary. At the conclusion of the mediation, the Chairman will review the mediator's report and make a determination. If the requesting party is still unsatisfied with the Chairman's decision, the party can appeal to the full NIGC Commission. The NIGC will make its decision based on the written record developed by the Chairman and written submissions by the testing laboratory, the requesting party, and the sponsoring tribe. The NIGC can request additional information and a hearing, but a hearing is not required. Any further relief would be available under the Administrative Procedures Act, 5 U.S.C. § 702 et seq.

In recognition "that Indian tribes are the primary regulators for Indian gaming," the NIGC identifies the tribal gaming regulatory authority as the "entity [to] authorize[e] specific games and gaming systems for use in that Tribes' gaming operation." 71 Fed. Reg. at 30252. And while it is stated that "[t]he testing laboratory does not 'classify' the game or 'aid' or otherwise usurp the authority of the Tribe's gaming regulatory authority," *id.*, tribal gaming regulatory authorities are afforded no meaningful role in the game classification process, to the extent they are provided a role at all. More significantly, even where a testing laboratory certifies a game as meeting the applicable Class II standards, the NIGC Chairman is authorized to object to such certification within 60 days of receipt of the certification and report, and anytime thereafter for "good cause" shown. The fact that the Chairman is authorized to second-guess a positive testing laboratory determination at any point in time means that an Indian nation – which would be forced by this regulation to invest millions of dollars in revamping its gaming

machine inventory – will enjoy no security or certainty with respect to the lawful operation of games on a going forward basis even where it has obtained a positive gaming testing lab determination.

While an Indian nation is afforded an opportunity to challenge the Chairman's objections, the Indian nation afforded no opportunity to challenge a negative determination from a testing laboratory. Thus, in order for the nation to contest a negative determination from a testing laboratory it must operate the gaming device at issue and hope that the Chairman initiates an enforcement action, and then challenge the testing laboratory determination through the formal NIGC appeal process. As previously espoused by the NIGC, "[a]s a matter of sound public policy as well as in the interest of fairness and due process, a regulated industry ought not to be forced to risk enforcement action in order to obtain a legally binding and judicially reviewable classification opinion from the Commission." 67 Fed. Reg. 46134, 46135 (Classification of Games proposed rule withdrawal).

In light of the fact that tribal gaming regulatory authorities are afforded no meaningful role in the game classification process and the inability of Indian Tribes to challenge testing laboratory determinations, the NIGC's acknowledgement of the primacy of tribal gaming regulatory authorities rings hollow, at best. Despite vehement objections from Indian country several years ago regarding the NIGC's failure "to recognize that the Commission *shares* responsibility for the regulation of Class II gaming with tribal governments," 67 Fed. Reg. at 46136 (emphasis added), the proposed rule effectively eliminates tribal gaming regulatory authorities from the game classification process. Recall that Congress, along with state interests, also sought to consider "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land," S. Rep. 100-446 at 5, and pursued that interest by reserving Class II games to exclusive tribal jurisdiction with oversight by the NIGC. The proposed Classification Standards run contrary to the regulatory regime IGRA established.

V. Technical Standards for "Electronic, Computer, or Other Technologic Aids" are Beyond the Scope of IGRA

The "Technical Standards" proposed by the NIGC would add a new part to the Commission's regulations establishing technical standards for Class II games – bingo, lotto,

other games similar to bingo, pull tabs, or "instant bingo" – that are played primarily through "electronic, computer, or other technologic aids." 71 Fed. Reg. 46336 (Aug. 11, 2006). The proposed rules would establish a process for assuring the "integrity" of games and aids before they may be placed in a Class II gaming operation. No federal standards currently exist. The Commission states that the purpose of this proposed rule is to assist tribal gaming regulatory authorities and operators in ensuring the integrity and security of Class II games and gaming revenues. The Commission notes that the proposed rule and the Minimum Internal Control Standards (MICS), 25 C.F.R. Part 542, have small areas of overlap.

As in the Classification Standards, these Technical Standards usurp the tribal gaming authorities' role in the game classification process. Further, the IGRA does not permit the NIGC authority over the classification process in the level of detail express in the Technical Standards. These Technical Standards should be offered to Indian tribes and their regulatory authorities as elective guidance, not as a rigid federal rule.

VI. The Classification Standards Will Have a Detrimental Impact on the Nation's Budget

The Nation has entered into a Compact with New York State that provides the Nation with the right to establish and operate three Class III gaming facilities in Western New York. The Nation currently operates the *Seneca Niagara Casino* on the Nation's Niagara Territory, and the *Seneca Allegany Casino* located on the Nation's Allegany Territory. Consistent with the Compact, the Nation is also actively pursuing its plans to develop and operate the *Seneca Buffalo Creek Casino* on the Nation's Buffalo Creek Territory.

While the vast majority of the gaming activities currently undertaken by the Nation are of the Class III variety, Class II gaming has long been and remains, a critical source of revenue to the Nation. The Nation operates Class II gaming facilities on the Nation's Allegany and Cattaraugus Territories. The revenue generated from Class II gaming greatly enhances the Nation's efforts to fund education, healthcare, and social service programs for its members. As indicated above, the Classification Standard will significantly slow down the speed of play, making the games significantly less attractive to customers. The effect of the proposed rules will greatly diminish the profitability of Class II gaming, and may adversely impact critical Nation programs and economic development opportunity.

VII. Conclusion

The proposed regulations are unwarranted and unjustified. In addition, the proposed regulations place unreasonable and unwarranted restrictions on the use of technologic aids in connection with Class II gaming. As described above, the proposed regulations usurp the primacy of tribal gaming regulatory authorities in connection with the classification of games. Finally, the proposals will render Class II gaming less relevant to the gaming market and could potentially have adverse impacts on the Nation's budget projections.

For these reasons, the Nation urges the NIGC to cease proceeding with these rules and permit current law, as established by the IGRA and case law interpreting it, to remain the law of the land.

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Thank you for your consideration of these comments. If you should have any questions regarding this matter, do not hesitate to contact Deputy Counsel Christopher Karns at (716) 945-1790.

Sincerely,

Kevin W. Seneca, Chairman
Seneca Nation Legislative Commission
Seneca Nation Councillor
SNI Representative to NIGA

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